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No. 08-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROYAL ATLANTIC CORPORATION, ROYAL ATLANTIC NORTH CORPORATION, ROYAL ATLANTIC RESTAURANT CORPORATION, THEMISTOCLES KALIMNIOS, ANTHONY KALIMNIOS, STEVEN KALIMNIOS, OCEAN REALTY HOLDING CORPORATION, DES REALTY CORPORATION, and STAR DEVELOPMENT REALTY HOLDING CORPORATION,

Petitioners,

v.

JUNE ROBERTS, STEPHEN LEE AND SUFFOLK INDEPENDENT LIVING ORGANIZATION (SILO), and ANITA BRADLEY, ELIZABETH GARDNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Second Circuit Court of Appeals correct in diverging from the Tenth Circuit Court of Appeals by imposing upon the Petitioners the burden of persuasion as to precise costs and specific design details in regard to what is readily achievable under 42 U.S.C. § 12182 or what is an alteration under 28 C.F.R. § 36.304; especially so when the issue was raised for the first time on appeal by the Respondents in their Brief after they tried the case under the Tenth Circuit guidelines which put the burden of specificity upon them?

2. Whether the Second Circuit Court of Appeals has deviated from the accepted and usual course of judicial proceedings when: (a) it chose to disregard the report (and testimony) of the independent architect claiming he was there only for settlement purposes and when it suited the Court to claim that his testimony would have been relevant in regard to a ramp, accessibility to the buildings themselves and for the pools; (b) in allowing on remand any evidence of alterations to the units in the Royal Atlantic North Corporation; or alterations to the pools and the parking lots to be presented by the Respondents when they failed to present a Prima Facie case in the first place at the trial level; (c) and in considering an issue for the first time on appeal?

3. Whether the Petitioner cooperative corporations, Royal Atlantic Corporation and Royal Atlantic North Corporation, can be forced to purchase or renovate a cooperative unit to accommodate the requirements of the American Disabilities Act without the proprietary

tenants and shareholders being parties to the action; or in the alternative can the cooperative corporations seize a unit or units on their own when the proprietary tenants are not parties to the proceeding in order to either purchase or renovate the units or are the proprietary tenants necessary parties under Rule 19a of the F.R.C.P.?

STATEMENT PURSUANT TO RULE 29.6

Petitioners have no parent corporations and no publicly held company owns 10% or more of the stock of any of the Petitioners.

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OPINION BELOW

The District Court's opinion now reported in *Roberts, et al. v. Royal Atlantic Corp., et al.*, 445 Fed. Supp. 2d 239 (DC E.D.N.Y. 2006) is reprinted in Appendix B.

The opinion of the U.S. Court of Appeals for the Second Circuit is reported in *Roberts, et al. v. Royal Atlantic Corp., et al.* in 542 F.3d 363 (2nd Cir. 2008) and is reprinted in Appendix A.

JURISDICTION

The U.S. District Court Eastern District of New York had jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 2201 and 42 U.S.C. §§ 12182, *et seq.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §§ 12182 *et seq.*

Section 12182 provides in pertinent part:

> (a) General Rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. [(b)(2(A)]: Discrimination. For purposes of subsection (a)

Discrimination includes:

> (iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift) . . .

28 C.F.R. §§ 36.402(a) and (b)

> an "alteration" is "a change to a place of public accommodation . . . that affects or could affect the usability of the building or facility or any part thereof".

STATEMENT OF THE CASE

The Respondents, with the exception of SILO, which is a non-profit corporation, are disabled persons seeking injunctive relief under the American Disabilities Act. The buildings in question were built well before 1992 which is the enabling date of the act. At the time of construction East Hampton Zoning Rules and Regulations were much more relaxed than today and the buildings were actually set on the property lines.

The Petitioner, Royal Atlantic Corporation, has 98 units and Petitioner, Royal Atlantic North Corporation, has 39 units. The size of the units range

from 250 to 364 sq. ft. in the Royal Atlantic Corporation, and 450 sq. ft. in the Royal Atlantic North Corporation. The units are for summer use only and are rented to outsiders by most of the shareholders/proprietary tenants, but not by all. The Respondents proceeded to try their case under the standards of *Colorado Cross Disability Coalition v. Hermanson Family Limited Partnership I*, 264 F.3d 999 (10th Cir. 2001). Up to now this was the leading case in the United States on the appeal level. Two major aspects of the case as presented by the Respondents were accessibility to the buildings and their facilities and accessibility to the residential units themselves. The remaining Petitioners were the original sponsors of the cooperatives who owned units at both cooperative buildings. It should be noted only first floor units were of concern because no elevators existed. Units are sold readily (at least when the economic world was more at peace).

During the course of the proceedings, which lasted from 3 to 4 years, the sponsors sold all of their first floor units, those units being more desirable. There was no injunction or restriction placed on any of the sponsors as to their right to free alienation. Recognizing that a court ordering a proprietary tenant to renovate his or her unit would require the proprietary tenant to become a party, an affirmative defense (the second affirmative defense) was raised in the Petitioners' Answer alleging that Respondents have failed to join parties indispensable under Rule 19a of the Federal Rules of Civil Procedure.

At trial it was demonstrated by the Respondents' expert, either through direct testimony or under cross-examination, that accessibility to the Petitioners' (Royal Atlantic Corp.) premises was hampered by multiple barriers.

When it came to accessibility to the pool area in Petitioner, Royal Atlantic Corp., the Respondents suggested a path of travel around the buildings, over the public beach and back into the pool facilities. It was at this point that the Court suggested that the parties agree to have an independent architect give an opinion as to the issues in the case and, in particular, an opinion as to accessibility utilizing a series of six (6) questions which became Court Exhibit 1 in the action. Relying on this independent expert's opinion, the Respondents' expert report and the testimony of the witnesses and the plans and photos of the resorts (Royal Atlantic Corporation and Royal Atlantic North Corporation) the Court found there was simply no accessible route into the buildings because both parking lots were small, steep and narrow. The District Court found that the feasibility of creating accessible parking spaces and/or ramps in the public parking lots was just not established.

The District Court also determined that there was no readily achievable accessibility to the pool facilities based on the evidence presented.

When it came to the renovation of the units themselves, the Court found that the suggestions by the Respondents' expert would cause the complete demolition of the bathroom and kitchen in the units and a drastic reduction of the actual living area.

There were renovations made to the bathrooms and kitchens of Petitioner, Royal Atlantic Corp., but the walls although reduced to the studs remained the same in size and dimension. Alterations under ADA means "any change that affects the usability of the facility." The Trial Court determined that the alterations to the bathrooms and kitchens did not fall within the meaning of the ADA regulations and that the Respondents did not meet the burden of proof that the removal of architectural barriers was readily achievable.

The Second Circuit Court decided that the Respondents' burden in regard to alterations is to make a plausibie demonstration as to what is an alteration under the American Disabilities Act. It then decided that the burden of precise costs and design details was to fall on the Petitioners because they have superior access to information as to the conditions of their building and would be able to demonstrate what is not readily achievable or what is not an alteration under the ADA. Then if a modification is an alteration under the American Disabilities Act, it is up to the Petitioners to show whether or not the paths of travel were made accessible to the "maximum extent feasible". Again, it is the burden on the Petitioners to demonstrate this and the costs are irrelevant. Only if it is "virtually impossible" to do may the Petitioners be excused. The Second Circuit Court also expressed the opinion that the more the change made by modification to a facility the closer it is to new construction utilizing *Borkowski v. Valley Central School District*, 63 F.3d 131 (2nd Cir. 1995) for support in its decision. It also held that in the course of updating and renovating the bathrooms and kitchens of the Petitioner, Royal Atlantic Corp., that in and of themselves caused a change in the usability of the units.

Removal of architectural barriers to the extent readily achievable in regard to the paths of travel and to the pool are also now shifted to the Petitioners again in regard to the burden of proof with specificity and details as they are the owners and possess the knowledge of their buildings. The Respondents now need only to give a plausible plan. Even if the ADA regulations could not be strictly adhered to, they are capable of being relaxed and it still is the burden of the Petitioners to show the Respondents' proposals would not be readily achievable even if relaxed. Lastly, in dealing with the issue of how relief could be granted since no first floor proprietary tenants were named as party defendants, the Second Circuit Court determined that volunteers could be requested by the cooperatives in regard to a unit purchase or renovation, the cost of which could be borne by everyone, but if no one volunteered the issue of the corporate structure and the issue of a failure to add indispensable parties could then be addressed by the District Court. Finally, this case was tried by the Respondents in accordance with the standards proscribed by the *Colorado Cross Disability Coalition v. Hermanson Family Limited Partnership I, supra.* The Respondents' provided their expert architect; they provided their expert accountant; and they provided their expert engineer. There was no reservation, object or preservation by the Respondents that they believed that the standard or standards as to precise costs and design details should not have been imposed upon them but rather upon the Petitioners. It was only in the Appellants' Brief that for the first time they raised the issue that they should not have proceeded with that burden of proof but rather it should be the Petitioners obligation to do so in their defense as they know the makeup of their buildings.

REASONS FOR GRANTING THE PETITION

Petitioners respectfully ask the Court to issue a Writ of Certiorari to review the vacation of the Judgment of the District Court for the Eastern District of New York by the United States Circuit Court of Appeals for the Second Circuit. This case gives the Court an opportunity to set forth a common set of standards in regard to the burden of proof between conflicting circuit courts and to set in place whether or not a change in standards can be raised for the first time on appeal. And, if not, to in turn reinstate the District Court's Judgment. This case also allows the Court to ascertain if the Second Circuit Court bent over backwards for the Respondents beyond accepted usual court proceedings and lastly whether or not the District Court can direct the Petitioners to, in essence, seize proprietary tenants' units either to renovate or to purchase if there are no volunteers.

(a) THE COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUIT COURTS AND NOT ALLOW AN ISSUE RAISED FOR THE FIRST TIME ON APPEAL TO BE USED TO VACATE THE DISTRICT COURT JUDGMENT.

The Second Circuit Court in its very opinion acknowledged that its decision was in divergence of the Tenth Circuit Court wherein at Page 4607 of the Opinion in footnote 6 it stated:

> "This view of the plaintiff's initial burden departs somewhat from that expressed by the Tenth Circuit in Colorado Cross Disability *Coalition v. Hermanson Family Ltd.*

> *Partnership I,* 264 F.3d 999 (10th Cir. 2001), where the court required that a plaintiff furnish "precise cost estimate" and "specific design" details regarding his proposed accommodation. *Id.* at 109. We think that this asks too much of the typical plaintiff, particularly where defendants can so quickly dispose of non-meritorious claims by reference to their knowledge and information regarding their own facilities."

Until now the general prevailing view was that the Plaintiff bore the burden of persuasion by demonstrating what was readily achievable with specificity as to details and costs. When alterations occurred, the standard was whether or not "the use of the facilities" was changed and if so this was also the Plaintiffs' burden of persuasion. Utilizing *Borkowski v. Valley Central School District,* 63 F.3d 131 (2nd Cir. 1995), the Second Circuit Court decided the more the renovations the closer it is to new construction. Whatever happened to whether or not the use of the facilities was altered? The new standard set forth by the Second Circuit Court is if the renovations were close to new construction that meant the use of the facilities was in and of itself changed. Once the use of the facilities was considered changed by the court, the paths of travel would have to be altered to achieve accessibility which the Court stated did not have to consider cost or expenses but whether or not it was impossible. Without question if you pour in enough money anything is possible. What kind of standard is that? The fact is that the units are used for a place to stay and sleep in. That is the primary use of the facility and it was not changed.

The kitchen and bathrooms are adjunct to the units. When the Second Circuit Court decided that the renovations were alterations under 28 C.F.R. § 36.402(b) changing the use of the facilities, it went on to say that the paths of travel to the altered areas must also be altered to the maximum extent feasible such as bathrooms, telephones, drinking fountains and so forth. Here it was the very bathrooms that were renovated. The Court put the cart before the horse. The sleeping rooms, the primary function of the unit, were not altered. See ADA accessibility Guidelines (ADAAG) 28 C.F.R. Part 36, Appendix A, revised July 1, 1994 Section 9.1.2m 9.1.5. Until now, the onus of determining what can be made readily achievable and what is an alteration changing the use of the facility was on the part of the Plaintiffs to demonstrate by specificity as to cost and details. The Second Circuit Court is embarking on an entirely new path requiring that the Respondents do just a plausible "brush stroke" and that the Petitioners burden is now to demonstrate with specific costs and design details what is not readily achievable to do. It has clearly shifted the burden to the Petitioners because they know their buildings rather than on the Respondents. But it is the Respondents who know what disabilities they have and what is readily achievable or reasonable to achieve to alleviate any discrimination. This divergence should be resolved.

Reference is made to *Gathright – Dietrich v. Atlantic Landmarks, Inc.*, 435 F.3d 1217 and 1227 (11th Cir. 2000) which was a case where the Court confronted the plaintiff's complaints that the expense of drafting what amounted to a preapproval construction contract, including detailed plans, engineering studies and so

forth in order to establish their case was too much. The Court, to the contrary held it to be not "too heavy a burden" to impose. It has always been the Plaintiffs burden to first establish a *prima facie* case. Not just to set up the Defendants to establish otherwise. It is topsy-turvy. The decision of the Second Circuit Court creates an open-ended obligation upon the Petitioners without taking into account any hardship or economic devastation. Such a concern was expressed in *Speciner v. National Bank,* 215 F. Supp. 2d 622, 627 (2002 D.C. Maryland). "The distinction between existing facilities on the one hand and new construction and alterations on the other, is premised on Congress' intent to 'protect existing businesses from undue hardship'. *See Pinnock v. International House of Pancakes Franchise,* 844 F. Supp. 574, 588 (SD CA 1993)". As the testimony showed the costs of further alterations to the individual units (the living area) would involve relocating electrical circuits which in turn would effect the second floor proprietary tenants and the need for structural changes to widen the entrance doors. To recoup those costs based on the net rental income received by the proprietary tenants would take approximately 10 to 20 years. Lastly, in the case entitled *Mannick v. Kaiser Foundation Health Plan, Inc.*, 2006 U.S. District Lexis 57 173, the very same set of facts as to renovations made to the bathroom in a hospital room occurred and it was held that it did not approach alterations to trigger new construction requirement necessitating redoing the room to be handicapped accessible. The bathrooms are accessories. The tail should not wag the dog. Petitioners position is quite consistent with *Regents of Mercers.*

College v. Rep. Franklin Ins. Co., 458 F.3d 159, 168, 169 which held:

> "28 C.F.R. Part 36, App. B, Section 36.402 . . . does not require alterations; it simply provides that when alterations are undertaken, they must be made in a manner that provides access
>
> * * * *
>
> Usability should be broadly defined to include renovations which effect the use of a facility and not simply changes which relate directly to access."

Here dormitories were damaged by fire and renovations were made to the undamaged portions the primary function.

Compounding this divergence between the Circuit Courts is how it arose in this proceeding in the first place. It has always been a cardinal rule in litigation of any kind that one cannot raise an issue for the first time on appeal that was not preserved in the case at trial. Reference is made to *Leyda v. Allied Signal, Inc.*, 322 F.3d 199, 207 (2nd Cir. 2003). "We normally will not reverse a Judgment on the basis of an argument that was not made to the District Court. *See i.e., Gilbert v. Frank*, 949, F.2d 637, 640 (2nd Cir. 1991); *Wilkerson v. Meskill*, 501 F.2d 297, 298 (2nd Cir. 1974) (per curiam)"

This, however, is exactly what happened here. The Respondents proceeded to try their case under the

standards pronounced in the Colorado case. They had their engineering expert, their architect and their accountant; they had drawings; they had extrapolations and accoutrements normal and customary. At no time did they indicate to the District Court or to the Petitioners that they intended to reserve, preserve or object to the manner in which they were presenting their case. As stated it was only in their Brief to the Second Circuit Court did they for the first time argue that the Petitioners should bear the burden of proof with specificity as to costs and details because they know their buildings. This was not changing horses in midstream, but rather after the horse already arrived on the other side of the bank. It is unfair to the District Court and the Petitioners. Litigation is expensive. Fair Warning was not much to ask. At least the Petitioners could have tried to defend on this new approach if they knew it during trial. It seems the Second Circuit Court made a politically correct decision but not a legally sound one. "While this bar to raising any new issues on Appeal is not absolute . . . , it may be overcome only when necessary to avoid a manifest injustice. *Leyda v. Allied Signal, Inc. supra*; . . . *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 527 (2nd Cir.), *cert. denied*, 498 U.S. 846, 111 S.Ct. 132, 112 L. Ed. 2d 100 (1990). *See also Masella v. Blue Cross and Blue Shield of Connecticut, Inc.*, 936 F.2d 98, 107 through 108 (2nd Cir. 1991). There was no claim by the Respondents that manifest injustice had occurred or any showing thereof. Again, the failure to raise an argument at any time in the District Court forfeited the argument on appeal. *East Haven Construction, LLC v. Neri Construction, LLC*, 376 F.2d 96, 101 (2nd Cir. 2004).

(b) THE SECOND CIRCUIT COURT HAS DEVIATED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The Second Circuit Court has deviated from the accepted and usual course of judicial proceedings when it picked and chose what testimony of the independent engineer or architect was relevant and what was only for purposes of settlement. In particular, on Page 4594 of the Second Circuit Court's Opinion it stated "At one point in the proceedings, the parties agreed that a report by an independent architect evaluating the feasibility of bringing the resort into compliance with the ADA would be prepared in hopes that it would facilitate a settlement."

In actuality no such thing occurred. The independent architect was appointed to determine whether or not accessibility could be plausibly achieved or anything. See Page 304 and 305 of the transcript. No one, neither the Court, the Respondents nor the Petitioners understood the appointment to be for settlement purposes.

Yet, after it is all said and done the same Second Circuit Court later on chided the District Court for not fully considering "the independent architect's testimony that the construction of a ramp in the north parking lot might be readily achievable if the ADAAG requirements were relaxed to permit a steeper ramp and the placement of accessible spaces further from the general route of travel than the ADAAG would otherwise allow." See Page 4618 of the Opinion. It further complained that

"the Court did not address the architect's assertion that such a problem could be avoided if the ramp were constructed to be narrower than the standard width otherwise mandated by the ADAAG ." See Page 4618 and 4619 of the Opinion. In essence the Second Circuit Court selected what it liked and disregarded what it did not like. How do you have it both ways? The decision of the Second Circuit Court in the remand directions is also a departure from the normal and usual course of judicial proceedings as it looks like they were taken out of a John Grisham novel. It directs the Respondents to develop evidence as to any alterations performed in the Petitioner, Royal Atlantic North Corporation, as well as to discovery of any alterations to the pools and parking areas. If you do not do it right the first time go back and the Court will show you how to do it correctly. Certainly at least in regard to the Royal Atlantic North Corporation, if the Respondents did not show any alterations were performed at the initial trial, how do they now get a second bite of the apple? If the Respondents failed in their proof and basically that is what the District Court said, is that not now a bar to its re-litigation? Exactly what is the function of the Second Circuit Court? The Petitioners believe it is to address error rather than to become a remedial agency?

Another deviation is that the Second Circuit Court, as previously stated, has relied on an issue raised for the first time on appeal, mainly that the burden of proof as to precise costs and design details should not have been on the Respondents, but on the Petitioners even though they tried it that way. Clearly this is a departure from acceptable procedure and practice.

(c) CAN ANY PRACTICAL RELIEF BE GRANTED IF NO VOLUNTEERS WOULD UNDERTAKE A SALE OR RENOVATION OF THEIR UNIT WITHOUT SHAREHOLDERS' CONTRIBUTION AND NO PROPRIETARY TENANT HAS BEEN MADE A PARTY DEFENDANT.

The final reason as to why this petition for a Writ of Certiorari should be granted is the problem of whether or not there is any practical relief to be obtained. The owners of the units were previously requested to volunteer their units. None offered to do so. The Second Circuit Court made suggestions as to how it could be approached. These suggestions were already taken up during a joint shareholders meeting of both the Royal Atlantic Corporation and Royal Atlantic North Corporation on October 21, 2008. No one in the Royal Atlantic North Corporation volunteered to sell or renovate his or her unit. No one offered to swap his or her unit nor would anyone change his or her mind if the shareholders agreed to any assessment to buy and renovate a unit. This was unanimously declined. In the Royal Atlantic Corporation, one offered to sell and two volunteered to renovate their units if the corporation paid for it, but no one wanted to swap any unit and none of the shareholders approved or agreed that it would changes their minds if the shareholders were assessed to buy and renovate their unit. Nor would the shareholders agree to an assessment. That needs a vote of a majority. There are no reserve funds for purchasing or renovating someone's unit. It is for the maintenance and upkeep of the common areas. Clearly a corporation has no "private eminent domain ability". What the

Second Circuit Court was doing in its decision was to tiptoe around Rule 19a of the Federal Rules of Civil Procedure, the failure to add an indispensable party. In reality, the Second Circuit Court was trying to cure a defect. A list of all proprietary tenants was given to the Respondents during discovery which became Exhibit 10 in the trial proceedings. They had that opportunity to bring them in. The resistance to the request to volunteer a unit is clear. The living area would be made smaller; the bathtub had to be removed and the kitchen for all intents and purposes eliminated. Who would want to do this to their unit? Without naming a particular proprietary tenant you have taken away his choice to no longer rent because once named as a party defendant he has that right. He may just say I am no longer renting. True these units are readily saleable, at least in the prior economic times, but forcing the corporations to buy one by an assessment of the unit owners requires the majority of the shareholders to pass and in every instance they refused to do so. How, therefore, is the money to be generated? The proprietary tenants and the Petitioner corporations are not incognizant that if a proprietary tenant were a party to the action that a Pyrrhic victory could only be achieved simply by taking the unit off the rental roles or by selling it. These are in reality only seasonal rentals. They are not life-supporting. The District Court indicated that while it was concerned as to whether it could grant any practical relief because of the absence of indispensable parties, it also said it was not a determinant in regard to the decision. The Second Circuit Court decided to go into the Judge's mind and stated that he did not go into the lesser alternatives because he already made up his mind there was no practical relief.

The issue as to whether or not proper parties were before the Court involving an ADA matter was raised in *Frotton v. Barkan*, 219 F.R.D. 31 (D.C. Mass. 2003). Here the plaintiffs sued under the ADA claiming that the defendant, a landlord of a retail plaza, did not remove architectural barriers that were readily achievable. The District Court was troubled that the merchants in the plaza were not cited in and required the plaintiffs to add them as necessary parties under Rule 19a of the F.R.C.P. because the issue as to who had control over the alleged barriers remained to be seen. At inception of this case the Respondents had opportunity and warning even at the first pre-trial status conference that the proprietary tenants were not made parties.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari and reverse the decision of the Second Circuit Court of Appeals and reinstate the Judgment of the United States District Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED SEPTEMBER 18, 2008

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: December 11, 2007
Decided: September 18, 2008)

Docket No. 06-4730-cv

JUNE ROBERTS, STEPHEN LEE AND SUFFOLK INDEPENDENT LIVING ORGANIZATION (SILO),

Plaintiffs-Appellants,

ANITA BRADLEY, ELIZABETH GARDNER,

Plaintiffs,

– v –

ROYAL ATLANTIC CORPORATION, ROYAL ATLANTIC NORTH CORPORATION, ROYAL ATLANTIC RESTAURANT CORPORATION, THEMISTOCLES KALIMNIOS, ANTHONY KALIMNIOS, STEVEN KALIMNIOS, OCEAN REALTY HOLDING CORPORATION, DES REALTY CORPORATION, and STAR DEVELOPMENT REALTY HOLDING CORPORATION,

Defendants-Appellees.

Appendix A

SACK, *Circuit Judge*:

The plaintiffs-appellants are disabled individuals—most of whom require a wheelchair for mobility—and a non-profit organization that provides services for, and advocates on behalf of, disabled persons in Suffolk County, New York. In a complaint filed in the United States District Court for the Eastern District of New York, the plaintiffs allege that the defendants, who own and manage a resort complex in Suffolk County ("Resort"), violate Title III of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12182 *et seq.*, because the Resort's rooms and facilities are not wheelchair-accessible. The plaintiffs sought injunctive and declaratory relief, attorneys' fees, and costs. Following a bench trial, the district court (Leonard D. Wexler, *Judge*) filed Findings of Fact and Conclusions of Law and, on the basis thereof, entered judgment in favor of the defendants.

For the reasons that follow, we vacate the district court's judgment and remand for further proceedings.

BACKGROUND

We summarize here those findings of fact relevant to this appeal that were made by the district court judge following the bench trial.

The Resort consists of several buildings containing apartment units located on oceanfront property in Montauk, New York. The Resort is organized for legal

purposes as distinct residential cooperative corporations. Two of them are among the defendants here—the Royal Atlantic Corporation ("Royal Atlantic South") and the Royal Atlantic North Corporation ("Royal Atlantic North").

Royal Atlantic North owns thirty-nine units of the Resort in a complex of five two-storey buildings. Royal Atlantic South owns ninety-eight units in a complex of six two-storey buildings. None of the buildings has an elevator.

Most of the Resort's units are between 250 and 450 square feet in area and include a bathroom and small kitchen. Each complex has one pool surrounded by a narrow deck. Each complex also has an associated parking lot. Although there are ramps leading from these lots to the Resort buildings, they are too narrow for a wheelchair to navigate and, for that reason among others, are not ADA-compliant. Both parking lots are relatively narrow (approximately fifty feet wide) and have gravel surfaces.

The two cooperative corporations also own the Resort's land and buildings. They lease units to individuals and entities known as "proprietary tenants" who are in turn shareholders in one or more of the corporations. Many proprietary tenants rent their units to members of the general public during the summer, although they may, of course, choose to occupy their own units during that period instead.

Appendix A

Units available for rent are typically advertised on the Resort's website. Defendant Double K Management Corporation ("Double K") acts as a sales agent for the rentals. Double K also serves as a management agent to provide maid, maintenance, and other services for each unit.

Each proprietary tenant leases his or her unit from one of the two corporations on terms that require that the tenant keep the interior of the unit—anything within its walls—in good repair. The corporations bear the responsibility for all other maintenance and repair related to the buildings, walkways, surrounding areas, and other common areas.

In June 2003, plaintiff Stephen Lee ("Lee"), who because of his disability must use a wheelchair to move about, was a guest at the Resort. Upon his arrival, he had difficulty navigating his wheelchair through the gravel-covered parking lot and was unable to ascend steps leading to the Resort office in order to check in.

Lee experienced daily frustration and embarrassment during the remainder of his stay. He was unable to use the bathroom in his unit because its doorway was too narrow to accommodate his wheelchair. As a result, he was forced to enlist family members to assist him. Lee was also unable to reach either of the Resort's pool areas in his wheelchair.

One of the other plaintiffs, June Roberts, uses a wheelchair and is the director of plaintiff Suffolk

Appendix A

Independent Living Organization ("SILO"), a not-for-profit corporation that acts as an advocate for disabled individuals in Suffolk County. Roberts testified that she visited the resort in April 2003 hoping to find a suitable location for a SILO conference, found that the Resort was not accessible, and was unable to use a grant for a conference because of the lack of accessible, affordable accommodations in Montauk. In February 2004, Lee and the other plaintiffs filed the complaint initiating this lawsuit.

A bench trial began on May 31, 2005. The district court examined the following issues relating to accessibility at the Resort: (1) the creation of accessible routes to Royal Atlantic South and Royal Atlantic North from their respective parking areas by way of ramps; (2) the configuration and modification of the parking areas at the Resort; (3) the creation of accessible parking spaces at Royal Atlantic South and Royal Atlantic North without substantially limiting the number of parking spaces or interfering with maintenance access to a cesspool; (4) access to the pool areas located at the Resort; and (5) the modification of some, but not all, of the previously altered apartment units. *Roberts v. Royal Atl. Corp.*, 445 F.Supp.2d 239, 244, 246 (E.D.N.Y.2006).

At one point in the proceedings, the parties agreed that a report by an independent architect evaluating the feasibility of bringing the resort into compliance with the ADA would be prepared in hopes that it would facilitate a settlement.

Appendix A

On August 15, 2006, the court rendered its Findings of Fact and Conclusions of Law. Among the latter, it decided, that Lee had standing to bring this action, and that the Resort was a place of public accommodation under 42 U.S.C. § 12181(7)(A).[1]

As the court further recognized, regulations adopted pursuant to the ADA impose access requirements on alterations made to public accommodations after January 26, 1992. *See* 28 C.F.R. § 36.402(a);[2] *see also* 28 C.F.R. § 36.402(b) (an "alteration"

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1. 42 U.S.C. § 12181(7)(A) provides in pertinent part:

> The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—
>
> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor. . . .

2. Section 36.402(a) provides:

> Any alteration to a place of public accommodation or a commercial facility, after January 26, 1992, shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

28 C.F.R. § 36.402(a).

is "a change to a place of public accommodation . . . that affects or could affect the usability of the building or facility or any part thereof"). The court decided, however, that the ADA's access requirements did not apply here because "[t]here was no evidence that the Resort underwent any alteration after 1992" within the meaning of ADA regulations. *Roberts*, 445 F.Supp.2d at 247.

As the district court also noted, the ADA requires removal of architectural barriers, regardless of whether alterations have been made, "where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv);[3]

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3. Section 12182 provides in pertinent part:

> (a) General rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.
>
> . . . .
>
> [(b)(2)(A)]: Discrimination. For purposes of subsection (a), discrimination includes—
>
> . . . .
>
> [iv] a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing

(Cont'd)

see 42 U.S.C. § 12181(9) (" '[R]eadily achievable' means 'easily accomplishable and able to be carried out without much difficulty or expense.' "). The court concluded, however, that the plaintiffs had the burden of proving that the modifications they sought would be "readily achievable" and that they failed to meet that burden. *Roberts,* 445 F.Supp.2d at 248.

Based on these conclusions, the court entered judgment in favor of the defendants. The plaintiffs appeal.

DISCUSSION

On appeal from a judgment after a bench trial, we review the district court's findings of fact for clear error and its conclusions of law de novo. Mixed questions of law and fact are also reviewed de novo. *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.,* 354 F.3d 112, 115 (2d Cir.2003).

(Cont'd)

> facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), *where such removal is readily achievable* . . . .

42 U.S.C. § 12182 (emphasis added).

Appendix A

I. Standing

The defendants do not dispute, and we agree with, the district court's determination that Lee had standing to seek all of the relief that he pursued before the district court at trial: wheelchair access to, from, and within the parking lots, pools, and within at least two apartment units. However, we note that SILO is asserting standing as an organization based on its inability to book hotel rooms in Montauk for its disabled employees and conference participants. In light of the number of disabled SILO employees and conference participants, it may be that SILO's injury as an organization would not be redressed by an injunction requiring Royal Atlantic to bring several units into ADA compliance. Therefore, on remand to the extent that SILO or any other plaintiff seeks relief distinct from that sought by Lee or on different claims than those pursued by Lee, the district court should consider whether each such plaintiff has standing.[4] In this connection, we note that 42 U.S.C. § 12188(a)(1) provides that "[n]othing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that

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4. The relief originally sought by the plaintiffs in their complaint included, *inter alia*, "Braille or enlarged font" signs and restaurant menus for persons with severe, uncorrected visual impairments. There is no allegation that Lee has a visual impairment; we therefore doubt he would have standing to seek such relief. But in the course of the district court proceedings the plaintiffs abandoned their claims related to this relief. We need not and do not address those claims here.

a person or organization covered by this subchapter does not intend to comply with its provisions."

II. Legal Framework

Title III of the ADA prohibits discrimination against individuals "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. . . ." 42 U.S.C. § 12182(a). A Title III claim therefore requires that a plaintiff establish that (1) he or she is disabled within the meaning of the ADA; (2) that the defendants own, lease, or operate a place of public accommodation; and (3) that the defendants discriminated against the plaintiff within the meaning of the ADA. *See Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir.2008). There is little dispute that the first two requirements have been met. At issue is the third: whether the inaccessibility of the Resort to wheelchair users constitutes discrimination under the ADA.

The ADA describes discrimination in both general and specific terms. Two provisions are relevant to this appeal. The first, which addresses the making of alterations, provides that "discrimination" includes,

> with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, *a failure to make alterations in such*

> *a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities,* including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or *access to an area of the facility containing a primary function,* the entity shall also make the alterations in such a manner that, to *the maximum extent feasible, the path of travel* to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are *not disproportionate to the overall alterations* in terms of cost and scope (as determined under criteria established by the Attorney General).

42 U.S.C. § 12183(a)(2) (emphasis added). The second provides that "discrimination" includes "a failure to remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable." *Id.* § 12182(b)(2)(A)(iv).

We must therefore first determine whether a challenged facility (or part thereof) has been "altered" in "a manner that affects or could affect its usability." If alterations have been made, a defendant

"discriminates" if those altered areas—and paths of travel to altered areas that "contain[ ] a primary function"—are not made readily accessible to disabled individuals "to the maximum extent feasible." *Id.* Even in the absence of alterations, a defendant nonetheless "discriminates" if it fails to remove any existing barriers to accessibility where such removal "is readily achievable." *Id.* § 12182(b)(2)(A)(iv).

A. When Is a Facility "Altered"?

The ADA does not expressly define the term "altered." The Department of Justice's implementing regulations, however, define "alteration" as "a change to a place of public accommodation or commercial facility that affects or could affect the usability of the building or facility or any part thereof." 28 C.F.R. § 36.402(b). The regulation describes by illustration what constitutes an alteration.

> Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical and electrical systems are not alterations *unless they affect the usability of the building or facility.*

28 C.F.R. § 36.402(b)(1) (emphasis added).

Under the implementing regulations, then, the concept of "usability" appears to be central to determining whether an alteration has been made. And the Department of Justice has commented that it "remains convinced that the [ADA] requires the concept of 'usability' to be read broadly to include any change that affects the usability of the facility, not simply changes that relate directly to access by individuals with disabilities." Final Rule, Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed.Reg. 35,544, 35,581 (July 26, 1991) ("Title III Final Rule"). The absence of a formal definition, however, renders interpretation a challenge. Neither the statute nor the regulation specifies the allocation of burdens of production and persuasion between the parties in establishing whether a facility has been altered.

The illustrations provided at section 36.402(b)(1), for example, suggest a distinction between major and minor changes to a facility—relative to its overall size—as well as between changes that do and do not affect the activities that can be performed in the facility, particularly those that are dependent on a facility's physical layout.

The ADA's requirement that "new construction," like altered facilities, be made "readily accessible and usable" to disabled individuals provides a separate and useful reference point. *See* 42 U.S.C. § 12183(a). The greater the change made by a modification to a facility or portion of a facility, the closer it is, in effect, to new construction. This is consistent with the relativity

principle in section 36.402(b)(1): The more a place is altered, the easier and cheaper it becomes, in both absolute and relative terms, to integrate incidentally features that facilitate ADA access. The ADA contemplates that both "alterations" and "new constructions" should be subject to similar accessibility requirements.

The concept of alteration seems generally to exclude from "alterations" those modifications that essentially preserve the status and condition of a facility, rather than rendering it materially "new" in some sense. As the cost, degree, or scope of a modification decreases, the likelihood that it approaches the equivalent of "new construction" or is therefore an alteration under the ADA also decreases. Even a relatively inexpensive or localized modification may, however, so fundamentally change the use of a facility that we would regard it as an alteration, particularly if it affects the purpose, function, or underlying structure of the facility.

Accordingly, our considerations for determining whether the modifications in this case are alterations under the ADA can (but need not) include factors such as:

1. The overall cost of the modification relative to the size (physical and financial) of the facility or relevant part thereof.

2. The scope of the modification (including what portion of the facility or relevant part thereof was modified).

3. The reason for the modification (including whether the goal is maintenance or improvement, and whether it is to change the purpose or function of the facility).

4. Whether the modification affects only the facility's surfaces or also structural attachments and fixtures that are part of the realty.[5]

Before making this assessment in the case before us, we must consider who bears the burden to establish that a modification is or is not an alteration. These regulations and commentary indicate that the concept of "alteration" is a relative one, requiring us to consider the nature, cost, degree, scope, and purpose of any alleged alteration. Our analysis is guided by our decision in *Borkowski v. Valley Central School District,* 63 F.3d 131 (2d Cir.1995). There, we addressed the allocation of burdens for the analogous task of establishing a "reasonable accommodation" for purposes of the Rehabilitation Act, 29 U.S.C. § 794. *See* Henry H. Perritt, Jr., *Americans with Disabilities Act Handbook* § 1.02

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5. Other cases may of course raise questions not at issue here, and the list is not meant to be exhaustive. *See* Final Rule, Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed.Reg. 35,544, 35,581 (July 26, 1991) ("The Department remains convinced that the Act requires the concept of 'usability' to be read broadly to include any change that affects the usability of the facility, not simply changes that relate directly to access by individuals with disabilities.").

(4th ed. 2003) ("The definition of disability is identical under the [ADA and the Rehabilitation Act], as are the basic concepts of discrimination, reasonable accommodation, and program and facility accessibility.").

In *Borkowski*, we observed that in applying the Rehabilitation Act and related statutes, our case law bars us from placing both the initial burden of production and the ultimate burden of persuasion on either the plaintiff or the defendant. Instead, we follow a "middle course." *Borkowski*, 63 F.3d at 137. To establish a "reasonable accommodation," a plaintiff "bears only a burden of production" that "is not a heavy one." *Id.* at 138. That is, it would be "enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits. Once the plaintiff has done this, she has made out a *prima facie* showing that a reasonable accommodation is available, and the risk of nonpersuasion falls on the defendant." *Id.*

We concluded in *Borkowski* that the plaintiff's burden does not require him or her to furnish exact or highly detailed cost estimates. Because defendants possess superior access to information regarding their own facilities, such as architectural plans, maintenance requirements and history, and the historical and projected costs of repairs and improvements, they are typically in a position far more easily to refute a plaintiff's proposal as unreasonable than is a plaintiff to prove otherwise. As we put it in *Borkowski*, the defendants have "far greater access to information than

the typical plaintiff, both about [their] own organization and, equally importantly, about the practices and structure of the industry as a whole." *Id.* at 137.

A similar analysis applies to our determination of whether a facility has been "altered." As in *Borkowski* and in light of our "alteration" analysis above, defendants can be expected to have superior access to information with which to refute assertions that their facilities have been altered within the meaning of the statute and the applicable regulations and commentary. To establish the existence of an alteration, a plaintiff fulfills his or her initial burden of production by identifying a modification to a facility and by making a facially plausible demonstration that the modification is an alteration under the ADA. The defendant then bears the burden of persuasion to establish that the modification is in fact not an alteration.

If we determine that a particular modification is an alteration under the ADA, we must then decide whether the alteration was made readily accessible and usable to disabled individuals to the "maximum extent feasible." 42 U.S.C. § 12183(a)(2).

Appendix A

B. When Is an Altered Facility Made Readily Accessible and Usable to the "Maximum Extent Feasible"?

As explained by regulation:

> The phrase 'to the maximum extent feasible' . . . applies to the occasional case where the nature of an existing facility makes it virtually impossible to comply fully with applicable accessibility standards through a planned alteration. In these circumstances, the alteration shall provide the maximum physical accessibility feasible. Any altered features of the facility that can be made accessible shall be made accessible. If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would not be feasible, the facility shall be made accessible to persons with other types of disabilities (e.g., those who use crutches, those who have impaired vision or hearing, or those who have other impairments).

28 C.F.R. § 36.402(c). Section 12183's "maximum extent feasible" requirement does not ask the court to make a judgment involving costs and benefits. Instead it requires accessibility except where providing it would be "virtually impossible" in light of the "nature of an existing facility." 28 C.F.R. § 36.402(c). The statute and regulations require that such facilities be made

accessible even if the cost of doing so—financial or otherwise—is high. Indeed, in promulgating the implementing regulations, the Department explicitly rejected suggestions that cost be considered with respect to this provision. *See* Title III Final Rule, 56 Fed.Reg. at 35,581 ("The legislative history of the ADA indicates that the concept of feasibility only reaches the question of whether it is possible to make the alteration accessible in compliance with this part. Costs are to be considered only when an alteration to an area containing a primary function triggers an additional requirement to make the path of travel to the altered area accessible."); *id.* ("Any features of the facility that are being altered shall be made accessible unless it is technically infeasible to do so.").

Only if there is some characteristic of the facility itself that makes accessibility "virtually impossible," then, may the provision of access be excused. Even in such cases, accessibility must be provided for all types of disabilities for which nondiscrimination is possible. For example, if a doorway is altered but the hallways leading to and from the doorway remain unaltered and too narrow for wheelchairs, this would seem to be the sort of "technical infeasibility," Title III Final Rule, 56 Fed.Reg. at 35,581, that would excuse a failure to provide accessibility. The owner would nonetheless be required to render maximal accessibility for other kinds of disabilities. Furthermore, because both the statute and regulations require that the alterations themselves be made to provide the maximum feasible accessibility, a court's assessment of feasibility must be made with

respect to the state of the facility before the alterations in question were made, rather than the facility's post-alteration state.

Although the "maximum extent feasible" standard is not a relative phrase in the same sense as is a reasonableness requirement, the applicable burdens of production and persuasion remain appropriately drawn from *Borkowski*, for the standard requires a similar degree of reliance on facilities-related information to which defendants would be expected to have superior access. So, once a plaintiff has met an initial burden of production identifying some manner in which the alteration could be, or could have been, made "readily accessible and usable by individuals with disabilities, including individuals who use wheelchairs," the defendant then bears the burden of persuading the factfinder that the plaintiff's proposal would be "virtually impossible" in light of the "nature of the facility." 42 U.S.C. § 12183; 28 C.F.R. § 36.402.

Section 12183(b), it will be recalled, requires that if a covered entity undertakes an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity must *also* make the alteration so that, "to the maximum extent feasible," the path of travel to the altered area and certain other facilities—bathrooms, telephones, and drinking fountains serving the altered area, 28 C.F.R. § 36.403—are readily accessible to and usable by individuals with disabilities, *provided* the alterations required by this provision are not disproportionate to

the overall alterations in terms of cost and scope or that the original alteration did not affect, nor could have affected, the usability of the facility. The same *Borkowski* burden-shifting mechanism applies when considering compliance in this regard.

The proportionality requirement limits the extent to which supporting areas must be made accessible. This changes the burdens placed on ADA plaintiffs and defendants. A plaintiff challenging the accessibility of the paths of travel, restrooms, telephones, and drinking fountains serving an altered area containing a primary function bears an initial burden of production that the area in question is covered by the statute and that the desired access may be achieved with a cost and scope not disproportionate to the overall alteration. This burden may be met with cost estimates that are facially plausible, without reference to design details, and are such that the defendant can assess its feasibility and cost. Once this burden is met, the defendant must persuade the factfinder that the cost and scope of compliance would, in fact, be disproportionate, or that the areas in question are not paths of travel (or restrooms, telephones, or drinking fountains) within the meaning of the statute and regulations.

C. When is the Removal of an Architectural Barrier "Readily Achievable"?

We conclude that the *Borkowski* approach is also appropriate when considering the removal of barriers under 42 U.S.C. § 12182(b)(2)(A)(iv), which applies even

to facilities that are neither new nor altered, and that are not paths of travel, bathrooms, telephones, or drinking fountains serving an altered area. When evaluating a claim under this provision, we require a plaintiff to articulate a plausible proposal for barrier removal, "the costs of which, facially, do not clearly exceed its benefits." *Borkowski*, 63 F.3d at 138. Neither the estimates nor the proposal are required to be exact or detailed, for the defendant may counter the plaintiff's showing by meeting its own burden of persuasion and establishing that the costs of a plaintiff's proposal would in fact exceed the benefits. Because the concept of "readily achievable" is a broad one, either party may include in its analysis, as costs or benefits, both monetary and non-monetary considerations.[6]

III. Wheelchair Access at the Resort

We examine the plaintiffs' claims for relief as they have been presented on appeal within the legal framework set forth in Part II of this opinion, above.

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6. This view of the plaintiff's initial burden departs somewhat from that expressed by the Tenth Circuit in *Colorado Cross Disability Coalition v. Hermanson Family Ltd. Partnership I*, 264 F.3d 999 (10th Cir.2001), where the court required that a plaintiff furnish "precise cost estimates" and "specific design" details regarding his proposed accommodation. *Id.* at 1009. We think that this asks too much of the typical plaintiff, particularly where defendants can so quickly dispose of non-meritorious claims by reference to their knowledge and information regarding their own facilities.

Our analysis is limited to the same issues considered by the district court regarding wheelchair access within, to, and from the parking areas and pool areas, and the modification of any two units to be usable by wheelchair users. We address only the issues that have been brought before us, which do not, of course, include whether the defendants have other obligations under the ADA.

A. Unit Accessibility

The first question is whether the units at the Resort have been altered within the meaning of the ADA and applicable regulations. This inquiry is a mixed question of law and fact. We therefore review *de novo* the district court's conclusion that "[t]here was no evidence that the Resort underwent any alteration after 1992." *Roberts*, 445 F.Supp.2d at 247. We review the court's underlying factual findings for clear error.

Based on the record and the district court's findings of fact, we conclude to the contrary, and as a matter of law, that a large fraction of the Resort's rooms were altered in the course of renovations made in 2000 and 2001. The district court did not make any specific findings regarding these renovations, but there is ample evidence to convince us that the affected units were altered then.

Appendix A

The minutes of a meeting of shareholders of the Royal Atlantic Cooperative Corporation,[7] held December 13, 1999, reported the shareholders' view that the "[b]athrooms and [k]itchens need[ed] to be [r]enovated for the 2001 season." The minutes explained that:

> In 1995 suggestions were made by owners, management and guests in reference to the condition of the bathrooms and kitchens. At that time management was asked to be aware but not pursue renovations. Through the years, we have done everything possible to repair and maintain these items. At this time their age (23-27 years) and wear are entirely to[o] evident. Their condition has progressed, and only a hand[ful] of rooms are in satisfactory shape.

Minutes of the Sixteenth Annual Shareholders Meeting of Royal Atlantic Cooperative Corp., Dec. 13, 1999, at 5 ("1999 Minutes"). The estimated costs and scope of the renovations to each unit were described as follows:

> Bathroom: $3,740.00
>
> Complete gut to studs, install wonderboard at tub surround and sheetrock remainder, install new floor tiles on mud base, wall tiles, shower enclosure, light fixture, tub and

7. The plaintiffs presented evidence of unit alterations only for those owned by Royal Atlantic South.

shower body, toilet, lavatory and faucet, spackle and paint.

Kitchen: $1,364.00

Remove and replace linoleum floor, baseboard molding and kitchen cabinets. Replace sink, faucet and stove as needed. Replace electric outlets to G.F.I., spackle and paint.

Id. at 6. The minutes stated that these renovations would "start at the end of the 2000 season and [be] completed the spring of year 2001. The actual cost for this project will be billed directly to the unit owners and collected from the rental . . . of the year 2000 season." *Id.* These renovations, according to the minutes, would "offer our guests yet another reason to continue their patronage at our unique seaside resort." *Id.* at 5-6.

The minutes of the shareholder meeting of the following year, 2000, confirmed the progress being made with respect to these renovations. The minutes noted that "[r]enovation is on schedule[.] [A]ll rooms have been gutted and the repair stages are in full swing. The only problems so far ha[ve] been that there appears to have been more rotted floors and joists th[a]n anticipated." Minutes of the Seventeenth Annual Shareholders Meeting of Royal Atlantic Corp., Dec. 11, 2000, at 7. And one year after that, the minutes of the annual meeting noted that during 2001, Royal Atlantic had "[c]ompleted renovations to 100 bathrooms, kitchens, and foyers." Minutes of the Royal Atlantic Corp. Stockholders

Meeting, Dec. 12, 2001, at 4. The kitchen and bath renovations cost a total of $527,095.00, which included the installation of certain ADA-compliant fixtures such as faucets, grab bars, tiles, and linoleum. *Id.*, addendum.

There is thus little doubt that the kitchens and bathrooms of the renovated rooms had been "altered" within the meaning of the ADA. First, as a renovation, these modifications easily fall within the illustrative examples of alterations at 28 C.F.R. § 36.402(b)(1). By performing a "gut to studs," Royal Atlantic essentially rebuilt the bathrooms and kitchens. The defendants would therefore have had ample opportunity to perform the renovations in a way that would ensure access by the disabled.

Moreover, this renovation work affected the vast majority of rooms at Royal Atlantic South. Its extensive nature suggests that the conversion of only a few units to be more fully accessible could have been achieved with a relatively small marginal increase in difficulty and cost compared to the overall cost of the project. It also reflects Royal Atlantic's intent, in undertaking these renovations, to upgrade the facilities, rather than merely maintain them. Having done "everything possible to repair and maintain" the units' bathroom and kitchen facilities, 1999 Minutes at 5, it appears that normal maintenance was no longer sufficient in light of the facilities' age. In the course of updating and renovating these facilities, the defendants changed the usability of the units. The ensuing modifications are therefore properly considered alterations under the ADA.

Because the renovations physically altered the Resort's units in a manner that affected their usability, the ADA requires that some of these units be made readily accessible and usable by disabled individuals "to the maximum extent feasible." *See* ADA Accessibility Guidelines ("ADAAG"), 28 CFR Part 36, App. A, revised July 1, 1994, §§ 9.1.2, 9.1.5 ("When sleeping rooms are being altered in an existing facility, or portion thereof," four rooms must be made accessible for every 76 to 100 altered rooms). The plaintiffs satisfied their initial burden of production by demonstrating that the defendants had not complied with the ADA in this regard, and by presenting a feasible proposal for renovating the rooms so as to make them wheelchair accessible.[8] The burden therefore shifted to the defendants to demonstrate that the prior alterations had been performed so that, "to the maximum extent feasible," the necessary proportion of units were each made readily accessible and usable by the disabled. Although there are reasons to doubt that this burden has been met, a decision on this issue requires a fact-intensive determination that cannot be resolved on the existing record. The district court should address this question in the first instance after taking such additional evidence as deemed advisable in order to do so. As we have explained, only if achieving accessibility would be "virtually impossible" in light of the "nature" of the

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8. Plaintiffs proffered an architect's report suggesting reasonably priced modifications that would render a typical unit wheelchair accessible. They would require adding accessories to the apartment and some renovations, which would enlarge the bathroom at the modest cost of some living space.

facility under 28 C.F.R. § 36.402(c) may the accessibility requirement be relaxed. On remand, the district court may not consider the comparative cost or scope of the proposed renovations. The feasibility of alterations should be ascertained with respect to the units' pre-alteration configuration, rather than their present state.

Similarly, the defendants' assertion that they do not now have the authority to renovate unilaterally specific units for accessibility has little bearing on whether they violated the ADA by renovating the kitchens and bathrooms without making any of them wheelchair accessible. Even if it is true that the cooperative corporation defendants have no unilateral power to interfere with individual proprietary leases, a proposition suggested by Double K in a 2003 letter to shareholders apprising them of this litigation, our inquiry under section 12183(b) is backward-looking. It asks whether, at the time the kitchen and bathroom renovations were performed, the defendants had made maximally feasible efforts to achieve the requisite level of accessibility. And although limitations on the defendants' authority arising from the ownership structure of a facility may be considered in evaluating the feasibility of compliance—a facility's ownership structure may fairly be encompassed within the "nature" of that facility—it seems to us that it would be a rare case where such limitations could excuse the ADA's accessibility requirement.

Some of the factual issues the district court might consider addressing on remand are whether the

defendants could have made some rooms wheelchair-accessible in the course of their renovations in 2000 and 2001 by offering to purchase units as they were offered for sale, by asking for volunteers among the individual unit owners whose costs for ADA compliance would be distributed among all owners, by offering additional compensation to those who volunteered their units, or by some other practicable and appropriate, even if costly, mechanism.

As explained at 28 C.F.R. § 36.403, "a 'primary function' is a major activity for which the facility is intended." Royal Atlantic's rooms are, of course, the central commercial offering of the facility. The units renovated in 2000 and 2001 were therefore undoubtedly areas of "primary function." As will be discussed, the paths of travel, bathrooms, telephones, and drinking fountains serving these rooms are also subject to the accessibility requirements of § 12183(b)(2), to the extent that this accessibility could have been achieved with cost and scope not disproportionate to the overall alteration.

B. Parking Area Access and Accessibility

We apply a similar analysis to the Royal Atlantic parking areas, asking first whether those areas have been altered. The record is sparse with respect to the modifications made to these lots, beyond evidence that tons of gravel had been added in 2000 and 2001. We therefore cannot, based on the existing record, make a determination as a matter of law as to whether the pool or parking areas have been altered. The district court should address this question on remand.

Should the district court conclude that the parking lots were altered, the defendants would, of course, be required to establish that they had been made readily accessible and usable to the maximum extent feasible; the plaintiffs have amply demonstrated the lots' inaccessibility to wheelchairs in satisfaction of their initial burden of production.

If, on the other hand, the district court concludes that the lots were not altered, then because the rooms were altered, and were areas of primary function, there is a question as to whether the lots are within the "path of travel" to the rooms, or to any other altered portion of the facility. *See* 42 U.S.C. § 12183(a)(2). If so, they must also be made accessible to the maximum extent feasible (provided the costs and scope of doing so are not disproportionate to the room alterations). If not, the less stringent "readily achievable" standard for existing facilities applies.

By regulation, a "path of travel" to an altered area includes "a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility." 28 C.F.R. § 36.403(e)(1). "An accessible path of travel may consist of walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a

combination of these elements." 28 C.F.R. § 36.403(e)(2). Although section 36.403(e) might be read to suggest that parking areas are no more than exterior approaches and not within the "path of travel" contemplated by statute, we think the better interpretation of this regulation is that the exterior approach refers to those structures that adjoin, and provide pedestrian access to, an owner's facilities, but that are not in fact part of those facilities. This interpretation is supported by the inclusion of "parking access aisles" as elements that may make up an accessible path of travel under 28 C.F.R. § 36.403(e)(2).

We conclude that the Royal Atlantic parking areas are along the path of travel to the rooms. They connect this area to the public street, which in this case provides the "exterior approach" to the Resort. Even if the parking lots were not "altered," then, they must still be made accessible "to the maximum extent feasible" at the time the alterations were made, subject to the proportionality limitation explained in detail at 28 C.F.R. § 36.403(f) and (g). However, because the path of travel for a person traveling by car begins at his or her parking space, this path need not include the entire parking area, only the path from an accessible parking space to the areas of public function within the Resort.

Also, although we have focused only on the Resort units, there may be other areas of primary function that were altered and whose costs must be considered in determining whether the cost and scope of accessibility would be disproportionate. *See* 28 C.F.R. § 36.403(h)(2)(i)

("If an area containing a primary function has been altered without providing an accessible path of travel to that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alterations to the primary function areas on that path of travel during the preceding three year period shall be considered in determining whether the cost of making that path of travel accessible is disproportionate."). Should the district court reach this question, a full analysis of alterations made to areas of public function would be required.

C. Access to Pool Areas

As with the parking lots, we cannot decide as a matter of law based on the existing record whether the Resort's pool areas were altered. This is another subject for the district court to consider upon remand.

Pool areas are obviously areas of primary function of a seafront, summer resort. If the district court concludes that they were altered, it would follow that the Resort was required to make paths of travel to these areas wheelchair accessible.

If the district court determines that the pool areas were not altered, the remaining question will be whether, because the pool was an existing facility, the defendants had failed to remove architectural barriers where such removal would be readily achievable as required under the ADA. In light of our discussion of the proper

application of this provision, the district court—should it reach this question—must reconsider its prior analysis of the plaintiffs' proposed pool renovations.

In its findings of fact, the district court observed that the pool renovation "plan offered by Plaintiffs . . . failed to take into account shifting sands, fencing requirements, interference with balconies and the impact of a large ramp on the number of people allowed by law to enter the pool area." *Roberts*, 445 F.Supp.2d at 246. As a consequence, the court concluded that "Plaintiffs failed in [their] burden" "to establish that the modifications sought . . . are readily achievable." *Id.* at 248.

In light of the relative burdens borne by each party, this analysis was flawed. The plaintiffs satisfied their initial burden of production by proffering plans—proposed themselves or with the aid of the independent architect—that would permit facially cost-effective wheelchair access to at least one of the pool areas.[9] The district court's finding that the plaintiffs had failed to take into account various other factors is of little import, for once the plaintiffs met their initial burden of production, it was the defendants' responsibility to prove that the proposals were not readily achievable.

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9. This included a proposal for a ramp leading to the pool.

Appendix A

D. Requirements If ADA-Compliant Remedial Measures Are "Not Readily Achievable"

An ADA regulation provides:

> If . . . the measures required to remove a barrier would not be readily achievable, a public accommodation may take other readily achievable measures to remove the barrier that do not fully comply with [ADA] requirements. Such measures include, for example, providing a ramp with a steeper slope or widening a doorway to a narrower width than that mandated by the [ADA]. No measure shall be taken, however, that poses a significant risk to the health or safety of individuals with disabilities or others.

28 C.F.R. § 36.304(d)(2). The purpose of the regulation is to "maximize the flexibility of public accommodations in undertaking barrier removal by allowing deviations from the [ADA's] technical standards," thereby promoting "certainty and good design at the same time that permitting slight deviations will expand the amount of barrier removal that may be achieved." Title III Final Rule, 56 Fed.Reg. at 35,570. Even if the defendants meet their burden, if one has been placed upon them, of demonstrating that the plaintiffs' proposals for the removal of existing barriers would not be readily achievable, the district court must then determine, under that regulation, whether any of these proposals would be readily achievable if certain ADA requirements were relaxed.

There is evidence that application of this rule might overcome some of the objections voiced by the defendants and the district court. For example, it appears that the district court has not considered fully the independent architect's testimony that construction of a ramp in the north parking lot might be readily achievable if the ADAAG requirements were relaxed to permit a steeper ramp and the placement of accessible spaces further from the general route of travel than the ADAAG would otherwise allow. Similarly, although the defendants argue that the plaintiffs' proposal for a ramp leading to the north pool area would not comply with the ADA's five-foot width requirement because of the presence of a nearby transformer, the court did not address the architect's assertion that such a problem could be avoided if the ramp were constructed to be narrower than the standard width otherwise mandated by the ADAAG.

The flexibility provision changes somewhat the defendants' burden. In addition to establishing that the plaintiffs' proposals would not be readily achievable, defendants must also establish that the proposals would not be readily achievable even if ADA design requirements were relaxed. Both possibilities must be addressed by the district court.

E. Relief and Named Defendants

The district court expressed doubts as to whether it had the power to order the requested relief in light of the Resort's ownership structure and the defendants'

explicit lack of authority to modify certain individual units at the Resort. *See Roberts*, 445 F.Supp.2d at 246-47. The plaintiffs in this case named as defendants the cooperative corporations, the managing authority, and some (but not all) unit owners, but they did not identify particular units for modification or identify and serve process on the owners of those units.

As an initial matter, we observe that the plaintiffs did properly identify at least some—and perhaps all—of the defendants contemplated by the ADA for claims under the ADA. In enacting the statute, Congress apparently intended that the prohibition against discrimination "appl[y] to any person who owns, leases . . . or *operates* a place of public accommodation." *H.R. Conf. Rep.* 101-558, 101st Cong., 2d Sess. (1990) (emphasis added). Of course, owners and operators of facilities may allocate by lease or contract their relative responsibilities for compliance with the ADA. *See Americans with Disabilities Act Handbook* at § 6.02. And the Department of Justice has provided informal guidance suggesting that the duty to remove barriers depends on who has legal authority to make alterations, "which is generally determined by the contractual agreement. . . ." *Id.* (quoting U.S. Dep't of Justice, *Questions and Answers* (rev.Sept.1992)).

We cannot say, however, based on the existing record and factual findings, whether, in this case, the plaintiffs' claims for relief would fail based on the named defendants' potential inability to comply with orders of the district court directing modifications. Perhaps

because the court concluded that no relief was available in the first place, it made no findings regarding the cooperative corporations' ability to solicit individual unit owners to volunteer their units for renovation on a distributed cost basis or with compensation, to purchase specific units as corporate property as they come onto the market, for corporate owners of second-floor units to swap with owners of first-floor units, or to buy first floor units when they come available, or for the unit owners to take any other action to cause the Resort to become ADA-compliant.

If the district court, on remand, concludes that the plaintiffs are entitled to some or all of the relief they have sought, the court should, of course, inquire whether the named defendants can comply with an order to provide that relief. Perhaps the defendants may do so unilaterally; perhaps they may be able to solicit the assistance of individual unit owners. As we have already noted, section 12183 requires, with respect to altered facilities, that all feasible efforts be made toward compliance without regard to cost, and the same requirement would apply to complying with orders for relief pursuant to this provision. It may well be, then, that the named defendants are able to comply with orders to modify individual units, if required, in light of the defendants' admission that at least thirty units in fact change ownership each year.

Only if the district court finds that the named defendants, having exhausted all options, are unable to comply with its orders would it need to consider whether

the plaintiffs had failed to identify and serve necessary and indispensable parties (such as individual proprietary tenants) under Fed.R.Civ.P. 19. We offer no view as to whether individual tenants would be proper defendants. These remain issues for the district court in the first instance.

CONCLUSION

For the foregoing reasons, the judgment of the district court is vacated and the cause remanded for further proceedings.

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AUGUST 15, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 03-2494

(Wexler, J.)

JUNE ROBERTS, ANITA BRADLEY, ELIZABETH GARDNER, STEPHEN LEE and SUFFOLK INDEPENDENT LIVING ORGANIZATION (SILO),

Plaintiffs,

-against-

ROYAL ATLANTIC CORPORATION, ROYAL ATLANTIC NORTH CORPORATION, ROYAL ATLANTIC RESTAURANT CORPORATION, DOUBLE K MANAGEMENT CORPORATION, STAR DEVELOPMENT REALTY HOLDING CORPORATION, DES REALTY CORPORATION, OCEAN REALTY HOLDING CORP., STEVEN KALIMNIOS, ANTHONY KALIMNIOS and THEMISTOCLES KALIMNIOS,

Defendants.

Appendix B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WEXLER, District Judge.

This action was commenced by Plaintiffs pursuant to the Americans With Disabilities Act, 42 U.S.C. § 12101 (the "ADA"). Specifically, the action is brought pursuant to Title III of the ADA, which prohibits discrimination in places of public accommodation. *See* 42 U.S.C. § 12182 (Title III). Named as defendants are various corporate entities and individuals with ownership and/or management interests in the Royal Atlantic cooperative buildings located in Montauk, New York (the "Royal Atlantic" or the "Resort").[1] Plaintiffs (with the exception of the corporate plaintiff organization) are disabled individuals who seek access to the rooms and facilities of the Resort.

A non-jury trial of Plaintiffs' claims was commenced on May 31, 2005. The parties adjourned the trial pending the completion of a report by an agreed upon architect (the "Independent Architect") who was charged with evaluating the Royal Atlantic to determine the feasability of changes to bring the property into ADA compliance. It was the hope of the parties and the court that the report of the Independent Architect would facilitate a settlement. When no settlement was reached,

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1. Also named as a defendant was the corporation controlling an adjacent restaurant. Plaintiffs have abandoned any claim for access to the restaurant.

the non-jury trial was resumed and concluded in April of 2006. The parties have submitted their proposed findings of fact, conclusions of law and legal memoranda. The court has considered those submissions and this constitutes the Court's findings of fact and conclusions of law.

FINDINGS OF FACT

A. *The Plaintiffs*

1. The individual plaintiffs are individuals with disabilities. Plaintiff Suffolk Independent Living Organization ("SILO") is a New York not-for-profit group the purpose of which is to advocate for disabled individuals in Suffolk County, New York.

B. *The Resort*

2. The Resort is a group of apartment units in buildings located on oceanfront property in Montauk, New York. The Resort consists of two separate residential cooperative corporations both named as defendants herein-the Royal Atlantic Corporation ("Royal Atlantic South") and the Royal Atlantic North Corporation ("Royal Atlantic North"). Royal Atlantic South consists of 98 units in 6 interconnected buildings on two floors. Royal Atlantic North consists of 39 units in 5 buildings on two floors. When referring to the two parts of the resort

and its facilities collectively, the court will refer to the "Resort."

3. Owners of units in the Royal Atlantic South and Royal Atlantic North corporations are shareholders in the respective corporations and holders of proprietary leases that give them the right to occupy particular units. The court will refer herein to unit owners as "proprietary tenants."

4. Proprietary leases govern the relationship between the Resort's cooperative corporations (the "Lessor") and the proprietary tenants. Two of those leases were entered into evidence at trial and are deemed by the court to represent the typical proprietary lease entered into between the cooperative corporations and the proprietary tenants (the "Lease").

5. Pursuant to the terms of the Lease, the Lessor is responsible for keeping in good repair the buildings at the Resort, its walkways and surrounding areas. The Lessor is also required to maintain and manage the Resort's buildings and to keep the common areas clean.

6. The terms of the Lease require that proprietary tenants keep the interior of their units in good repair. Proprietary tenants are responsible for the painting and decorating of their units. Additionally, they are responsible

for the maintenance, repair and replacement of plumbing, gas and heating fixtures and equipment as well as refrigerators, ranges and other appliances, exposed pipes and the fixtures to which they are connected. The responsibility of proprietary tenants ends at the walls of the units so that they are not responsible for those pipes or conduits that are within the walls of the unit but are responsible for lighting and electrical fixtures and equipment on the interior walls of the unit.

7. Proprietary tenants are required to obtain the written consent of the Lessor before making any alteration to the water, gas, plumbing, heating, air conditioning, electrical conduits, wiring or outlets in the unit.

8. The Resort is located on oceanfront property. Units are located on two floors. There is no elevator between levels and the parties agree that accessibility to the second story units is not at issue here.

9. Among the amenities made available to the proprietary tenants are outdoor swimming pools located in the center of first floor units at the Resort. The pools are located at the Royal Atlantic South and the Royal Atlantic North and are surrounded by a narrow deck.

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10. Units at the Resort are appropriate for use only during the summer months. Many proprietary tenants make their units available for rental to the general public during the summer months. These units are advertised to the public on the Resort's website. The exact number of proprietary tenants who make their units available for rental (as opposed to those who retain their units for their own personal use during the summer season) was not established at trial.

11. Units owned by the Royal Atlantic Corporation were built in the early 1970's. Each of these units consist of a total area of between 250 and 364 square feet. Included in this square footage is a bathroom and a small kitchen area with a refrigerator and stove.

12. Units owned by the Royal Atlantic North Corporation were built in the early 1980's. Each of these units consist of a total area of approximately 450 square feet. Included in this square footage is a bathroom and a small kitchen area with a refrigerator and stove.

C. *The Defendants*

13. Defendants Royal Atlantic Corporation and Royal Atlantic North Corporation are cooperative corporations that own the land and buildings at the Resort.

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14. Defendant Double K Management Corporation ("Double K") is a management agent that, in exchange a portion of the rental income of a unit, provides services attendant to the rental. For example, Double K provides for maid and maintenance service during the rental period. Double K also acts as a sales agent for proprietary tenants, arranging for rentals when inquiry is made. The relationship between Double K and proprietary owners wishing to rent their units is governed by a management rental agreement.

15. Defendant DES Realty ("DES") is a proprietary tenant in both the Royal Atlantic Corporation and the Royal Atlantic North Corporation. When this action was commenced, DES owned certain units on the first floor of the Resort. During the pendency of this action, DES sold certain of its units and all units currently owned by DES are located on the second floor of the Resort.

16. Defendant Ocean Realty Corporation ("Ocean Realty") is a proprietary tenant in both the Royal Atlantic Corporation and the Royal Atlantic North Corporation. When this action was commenced, Ocean owned certain units on the first floor of the Resort. During the pendency of this action, Ocean sold certain of its units and all units currently owned by Ocean are located on the second floor of the Resort.

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17. Defendant Star Development Realty Holding Corporation ("Star") is a proprietary tenant in both the Royal Atlantic Corporation and the Royal Atlantic North Corporation. When this action was commenced, Star owned certain units on the first floor of the Resort. During the pendency of this action, Star sold certain of its units and all units currently owned by Star are located on the second floor of the Resort.

18. Defendants Steven Kalimnios and Anthony Kalimnios are proprietary tenants who have, during the entire pendency of this action, owned second floor units at the Resort.

19. Units owned by the named Defendants originated from a corporate entity known as Taukpoint Realty Corp, the corporate sponsor of the cooperatives upon their formation.

20. There is no evidence that Defendant Themistocles Kalimnios is a proprietary tenant who owns any unit in the Resort.

21. At no time during the pendency of this lawsuit have Plaintiffs asked that the sale of any units at the Resort by restrained in any way and the court has never entered an order to that effect. Thus, there has never been any court ordered restriction on the sale of any units and the proprietary tenants have remained free to offer their units for sale in the marketplace.

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D. *Plaintiff Steven Lee's Stay at the Resort*

22. Plaintiff Steven Lee ("Lee") uses a wheelchair. Lee was a guest at the Resort during the last week of June 2003. During his stay at the Resort, Lee had difficulty negotiating his wheel chair through the gravel covered parking lot. Mr. Lee had difficulty checking into the Resort because his wheelchair could not enter the office due to the presence of steps. Lee was assisted in getting to the room of a family member by a Resort employee who helped to push Mr. Lee's wheelchair through the gravel parking lot.

23. The doorway leading to the bathroom in Mr. Lee's room was not wide enough to accommodate Mr. Lee's wheelchair. Consequently, he was unable to enter the bathroom during his stay at the Resort. Since Mr. Lee uses a catheter, he required the assistance of family members in emptying his urine bottle.

24. Mr. Lee was unable to use his wheelchair to enter the pool area of the Resort.

E. *Accessibility Issues Addressed At Trial*

25. Accessibility issues addressed at trial were: (1) creating an accessible route to the Royal Atlantic South from its parking area by way of

a ramp; (2) creating an accessible route to the Royal Atlantic North from its parking lot by way of a ramp; (3) configuration and modification of the parking areas at the Resort; (3) the creation of accessible parking spaces in close proximity to a ramp leading to the Royal Atlantic South without substantially limiting the number of parking spaces or interfering with access to a cesspool; (4) the creation of accessible parking spaces in close proximity to a ramp leading to the Royal Atlantic South without substantially limiting the number of parking spaces or interfering with access to a cesspool; (5) access to the pool areas located at the Resort.

26. These accessibility issues were addressed by expert reports, direct testimony and cross examination. The court also had the benefit of plans and photographs of the Resort to aid in its assessment of the accessibility issues.

F. *Court's Findings As To Accessibility To the Resort From Parking Lots*

27. There are existing ramps leading from the parking lots to the Resort. These ramps are not ADA complaint.

28. There is no accessible route to the Royal Atlantic South because the access from the parking lot is too narrow for a wheelchair to negotiate.

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29. There is no accessible route to the Royal Atlantic North because the access from the parking lot is too narrow for a wheelchair to negotiate.

30. The ramp leading to the Royal Atlantic North is not used by the general public for access to the Resort.

31. The ramp leading to the Royal Atlantic North is located near an electrical transformer. Reconfiguration of this ramp to render it ADA compliant would move the ramp closer to the electrical transformer. Plaintiff's expert did not consider the proximity of the electrical transformer when considering modifications to the ramp.

32. The Long Island Power Authority requires a five foot clearance on each side of this electrical transformer. There was no testimony that an ADA compliant ramp could also comply with the clearance requirement.

33. The parking lots for both the Royal Atlantic South and the Royal Atlantic North are gravel and unpaved. Neither parking lot has accessible parking spots. These lots are approximately 50 feet wide. The narrow nature of the parking lots requires that parking be head-on.

34. The Independent Architect expressed the opinion that the creation of an accessible parking space to the existing ramps would not ADA complaint because the concepts of "accessible parking" and "accessible route" are conditional upon each other. He also expressed the opinion that creation of accessible parking spaces would not be feasible because the small, steep and narrow nature of the parking lots would result in the loss of too many parking spots. This opinion applied to both parking lots at the Resort.

35. Plaintiffs offered testimony that the parking lots for the Resort be paved down the middle to provide an area for eased wheelchair mobility. The design for this suggestion was vague and unsupported by specific plans. Further, given the narrow nature of the parking lots, this suggestion created an unsafe condition in which cars would have to be parked too close together to allow for a safe egress from vehicles.

36. The court finds that the feasibility of creating accessible parking spaces and/or ADA compliant ramps in the Resort's parking lots was not established. The court bases this finding on the expert opinion of the independent architect along with the testimony and exhibits introduced at trial.

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G. *Court's Findings As To Accessibility to Pools*

37. The Independent Architect expressed the opinion that access to the pool located at the Royal Atlantic South could be accomplished by building a switchback ramp. This opinion was based upon the impression that "storage sheds" could be removed. What were assumed by the Independent Architect to be storage sheds, however, were part of a snack bar that could not be easily moved.

38. In addition to requiring the building of ramps, accessibility to the pools located at the Resort would also require installation of a wheelchair lift. Such a lift would eliminate one set of stairs used to enter the pool areas.

39. Construction of an ADA compliant ramp to allow for access to either pool area would require construction of a switch back ramp that would occupy approximately 176 square feet and would interfere with the balconies of at least three units.

40. Testimony regarding access to the pools at the Resort offered by the Plaintiffs suffered from several flaws. In particular, proposed access involved the use of public property controlled by the town of East Hampton (the "Town"). There was no evidence that the Town was ever notified of any such plan. The Town's

agreement to any such modification was speculative. The plan offered by Plaintiffs also failed to take into account shifting sands, fencing requirements, interference with balconies and the impact of a large ramp on the number of people allowed by law to enter the pool area.

H. *Court's Findings as to Modifications to Units*

41. Also at issue was the modification of at least some units so that they could be used by individuals using wheelchairs. Plaintiffs concede that it would be disproportionately prohibitive, from a financial point of view, to modify all first floor units at the Resort. They ask, however, that this court order that any two units be modified.

42. As noted, units at the Royal Atlantic South, built in the early 1970's, consist of a total area of between 250 and 364 square feet. Those units located at the Royal Atlantic North, built in the early 1980's, consist of a total area of approximately 450 square feet. Included in this square footage of all units is a bathroom and a small kitchen area with a refrigerator and stove.

43. Plaintiffs offered the expert report of architect Frank A. Restituto which expressed the opinion that it was readily achievable, by common construction techniques, to create wheelchair accessible rooms.

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44. The renovation plans offered by Plaintiffs involved almost complete demolition of the bathroom and kitchen of the units. The renovation would extend the size of the bathroom so that it would encroach upon the area where the bed is located. The renovation would limit the size of the bed that could be placed in the living area, requiring only a double bed and not two single beds.

45. Plaintiffs' proposed renovation would also substantially alter the configuration of the kitchen. The changes proposed would reduce the size of the kitchen so that it could no longer accommodate the existing full size refrigerator and stove and would accommodate only a two coiled burner in its place.

46. Plaintiffs' proposed renovation failed to properly take into account the relation of the entry door to the interior of the unit or whether it was feasible to relocate an electrical panel.

47. The cost of Plaintiffs' proposed renovations was stated to be approximately $22,000 per unit.

48. Defendants' offered testimony that given the net income of a typical unit, it would take between six and twenty years to recoup the costs of the proposed renovations.

49. Plaintiffs proposed renovation plan also suffers because they did not specify the particular units that they wished to modify nor did they identify the proprietary owners of those units.

50. While Plaintiffs named the corporate and individual entities discussed above as defendants, all individual proprietary tenants and, in particular, those proprietary tenants whose units Plaintiffs wish to modify, were neither identified nor served.

51. The failure to name and serve those proprietary tenants whose units are sought to be modified also gave the court great pause as to its ability to order the relief sought. In view of the court's findings regarding flaws in Plaintiffs' proposed renovation plan, the court need not rule on the necessity of naming each proprietary tenant and will not rest any holding on this ground.

CONCLUSIONS OF LAW

1. At least one Plaintiff, Stephen Lee ("Lee") established that he is a qualified individual with a disability within the meaning of the ADA, 42 U.S.C. § 12111(8). Lee's testimony established his difficulty maneuvering his wheelchair throughout the Resort and his difficulty in using the bathroom in his unit.

2. Plaintiff Lee has standing to pursue this litigation.

3. Title III prohibits discrimination against disabled individuals in the "full and equal enjoyment of the goods, services, facilities, advantages, or accommodations of any place of public accommodation . . ." 42 U.S.C. § 12182(a).

4. Places of public accommodation subject to Title III include inns, hotels and places of lodging containing at least five rooms if the operations of such entities affect interstate commerce. 42 U.S.C. § 12181(7)(A).

5. The Resort is a place of public accommodation within the meaning of Title III.

6. It is a violation of Title III to fail to design and construct ADA compliant facilities for first occupancy later than 30 months after July 26, 1990.

7. With respect to existing facilities, Title III of the ADA requires, *inter alia*, that places of public accommodation remove architectural and structural barriers if such removal is readily achievable. *See* 42 U.S.C. § 12182(b)(2)(A)(4); *see* 42 C.F.R. § 36.304(a).

8. Title III's access requirements apply to alterations made to places of public accommodation after January 26, 1992. *See* 28 C.F.R. § 36.402(a). An "alteration" is defined as "a change to a place of public accommodation . . . that affects or could affect the usability of the building or facility or any part thereof." 28 C.F.R. § 36.402(b). Alterations include remodeling, renovation, rehabilitation and changes in structural parts or elements, and changes or rearrangements in the plan configuration of walls and full height partitions. 28 C.F.R. § 36.402(b)(1). Alterations triggering compliance with Title III do not include normal maintenance, painting, wallpapering, asbestos removal or changes to mechanical and electrical systems "unless they affect the usability of the building . . ." *Id.*

9. The buildings at the Resort were built prior to the effective date of Title III. There was no evidence that the Resort underwent any alteration after 1992 within the meaning of the regulations referred to above. The court therefore applies the legal standard regarding existing buildings when determining whether there has been a violation of Title III.

10. Barrier removal and alternative access requirements with respect to existing facilities are required only if meeting such requirements is readily achievable. 42 U.S.C.

§ 12182(b)(2)(A)(iv); *see Spector v. Norwegian Cruise Line, Ltd.*, 545 U.S. 119, 125 S.Ct. 2169, 2176-77, 162 L.Ed.2d 97 (2005).

11. "Readily achievable," within the meaning of the ADA means "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9). When determining whether a modification is readily achievable, the court considers the nature and cost of the action needed and the financial impact of the proposed modification on the facility involved. *See* 42 U.S.C. § 12181(9)(A-D).

12. It was Plaintiffs' burden to establish that the modifications sought with respect to access to the facilities and rooms at the Resort are readily achievable. Based upon the findings of fact above, the court holds that Plaintiffs failed in this burden.

CONCLUSION

1. Plaintiffs' claims are hereby dismissed.

2. The Clerk of the Court is directed to enter judgment in favor of the Defendants.

3. The Clerk of the Court is further directed to terminate any outstanding motions and to close the file in this case.

SO ORDERED.

Appendix B

s/ Leonard D. Wexler
LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Dated: Central Islip, New York
August 15, 2006